



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Industrial Enterprise of America, Inc.

**File:** B-239898

**Date:** September 18, 1990

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E. Jay Jones for the protester.  
Maria T. Ventresca, Esq., and Michael Trovarelli, Esq.,  
Defense Logistics Agency, for the agency.  
Amy M. Shimamura, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

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### DIGEST

1. Since the General Accounting Office resolves doubt over the timeliness of a protest in the protester's favor, protest is considered timely under our Bid Protest Regulations, even though contracting agency states it mailed notice of contract award a month prior to the protest filing date, where the agency provides no evidence of the actual date of mailing or the date of receipt by the protester, and the protester states that it received the notice 7 days prior to filing its protest.
2. A small disadvantaged business (SDB) regular dealer which proposed to supply end-items manufactured by a large business is not entitled to the SDB evaluation preference incorporated in a solicitation.

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### DECISION

Industrial Enterprise of America, Inc. (IEA), a self-certified small disadvantaged business (SDB), protests the award of a contract to Vollrath Group, Inc., Gallaway, Tennessee (Vollrath-Tennessee), a large business, under request for proposals (RFP) No. DLA120-90-R-9066, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA), Philadelphia, Pennsylvania, for 2,076 corrosion-resistant steel utility pails. These pails were ultimately consigned for four defense depots.

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IEA contends that the DLA improperly failed to give IEA the 10 percent SDB preference in its favor as required by the RFP, and that the awardee, Vollrath-Tennessee, conspired with IEA's supplier, the Vollrath Group, Inc., Sheboygan, Wisconsin (Vollrath-Wisconsin) to improperly disclose IEA's price during the procurement.

We deny the protest.

The RFP included Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 52.219-7007 (DAC 88-11), "Notice of Evaluation Preference for Small Disadvantaged Business (SDB) Concerns, (ALTERNATE I)." The SDB clause advised that offers would be evaluated by adding a factor of 10 percent to offers from concerns that are not SDB concerns and to offers from SDB concerns which elect to waive the SDB evaluation preference. The SDB clause also advised that an SDB regular dealer submitting an offer in its own name must furnish end-items manufactured or produced by small business concerns.

The RFP, as issued on November 15, 1989, also included DPSC clause 52.247-9003, "Delivery to EDDS [Enhanced DLA Distribution System] Site," which permitted offerors to deliver small package and less-than-truckload shipments to selected Material Consolidation Points (MCP) for consolidation with other less-than-truckload shipments. From the MCPs, consolidated shipments are then forwarded at truckload rates to the defense depots.

Three offers were received by the December 15 closing date for receipt of proposals. Both IEA and Vollrath-Tennessee submitted identical low offers of \$16.58 per unit and both indicated that delivery would be under EDDS.

On February 9, the contracting officer issued a request for best and final offers (BAFO) with a February 22 closing date to all three offerors. This request advised that delivery under the EDDS program was no longer permitted and that BAFO prices should be proposed on an F.O.B. destination basis to the four defense depots to which the pails were consigned.

The DLA made this change after determining, from its review of Vollrath's price list, that the pails could be procured at the same price whether delivered to the MCPs or the defense depots. Thus, this change was made to save the cost of transporting the pails from the MCPs to the depots.

Vollrath-Tennessee's BAFO unit price remained \$16.58 while IEA's unit price increased to \$17.48. Although IEA represented itself as an SDB, DLA did not apply the 10 percent SDB preference to the Vollrath-Tennessee bid because IEA indicated in its BAFO that its supplier was Vollrath-Wisconsin, a large business.<sup>1/</sup> Thus, the contracting officer awarded Vollrath-Tennessee the contract on May 3, and a notice of award, dated May 3, was mailed to IEA. IEA filed this protest on June 1.

#### TIMELINESS OF PROTEST

As a preliminary matter, DLA contends that IEA's protest is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1990), since it was not filed within 10 days after the protester knew or should have known of the basis of protest. Here, DLA states that the notice of contract award was mailed to IEA on or soon after May 3, the date of award, but IEA only protested on June 1.

As noted by DLA, in the absence of any evidence to the contrary, our Office presumes the receipt of mail within 5 days of mailing. LightningMaster Corp.--Request for Recon., B-236323.3, Oct. 3, 1989, 89-2 CPD ¶ 291. In this case, however, the protester stated that it received the notice of contract award on May 25. DLA has provided no evidence of the exact date of mailing or a return receipt or other evidence which shows a date when IEA received the May 3 notice. Where, as here, the contracting agency and the protester provide conflicting statements about the timeliness of a protest, and the agency produces no evidence to establish that the protest is untimely, our Office will resolve doubt in favor of the protester. GEBE Gebaeude und Betriebstechnik, GmbH, B-231048, July 7, 1988, 88-2 CPD ¶ 20. We therefore decline to dismiss the protest as untimely and will consider it on the merits.

#### SDB EVALUATION PREFERENCE

IEA first contends that the agency improperly failed to apply the 10 percent SDB preference and the purpose of the SDB program of assisting such firms in competing against large non-minority businesses was therefore defeated.

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<sup>1/</sup> With the application of the 10 percent preference in IEA's favor, the protester's \$17.48 unit price would have been lower than Vollrath-Tennessee's evaluated unit price of \$18.24 (\$16.58 plus the 10 percent preference).


We find that DLA acted properly in not applying the 10 percent preference in IEA's favor because that firm proposed to supply end-items that were manufactured by Vollrath-Wisconsin, a large business. As indicated in the RFP, a specific condition of the SDB preference program is that SDB firms who are regular dealers must agree to supply the products of SDB or small business firms. DFARS § 252.219-7007(c)(2). Given that IEA proposed to totally subcontract the supply of this item to a large business concern, no purpose of the SDB program is thwarted by IEA not receiving the SDB preference; since the application of the preference in these circumstances would primarily benefit large businesses that sell to the government through SDB regular dealers. See Baszile Metals Serv., B-237925; B-238769, Apr. 10, 1990, 90-1 CPD ¶ 378.

#### ALLEGED PRICE LEAK

IEA also contends that the awardee, Vollrath-Tennessee, and its supplier, Vollrath-Wisconsin, conspired to disclose IEA's price during the procurement. The protester explains that in its initial proposal its unit price was \$16.58 which it disclosed to Vollrath-Wisconsin when it calculated its transportation costs for its BAFO. IEA suggests that as the result of contacts between the two Vollrath companies, the awardee had information on IEA's offered unit price and was therefore able to offer a lower unit price.

However, IEA admittedly voluntarily disclosed its price to Vollrath-Wisconsin. Moreover, the record establishes that Vollrath-Tennessee did not lower its price in its BAFO. In any case, to the extent that IEA asserts that Vollrath's actions constituted price-fixing or a violation of the Anti-Trust laws, this matter is for consideration by the Justice Department and not by our Office under our bid protest function. See Incore, Inc., B-236997, Oct. 13, 1989, 89-2 CPD ¶ 354.

The protest is denied.

  
James F. Hinchman  
General Counsel